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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

JUN 29 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:

Amendment of §76.51,)
 Major Television Markets)
 (San Francisco-Oakland-)
 San Jose, California))

To: Chief Policy and Rules Division
 Mass Media Bureau

PETITION FOR RULEMAKING

First Century Broadcasting, Inc., licensee of KFCB-TV, Channel 42, Concord, California (KFCB), pursuant to Rule 76.51 and 1.401, initiates this Rulemaking. Specifically, KFCB requests that Rule 76.51, major television markets, be amended to change the designated San Francisco-Oakland-San Jose market to include Concord, California. KFCB respectfully requests that this Petition for Rulemaking be processed on an expedited basis. As the Commission recently noted in its Report and Order Broadcast Signal Carriage Issues, FCC 93-144 (released March 29, 1993), "Where appropriate, we will consider such cases under an expedited rulemaking procedure whereby we will issue a Notice of Proposed Rulemaking based on the submitted petition without first seeking public comment on whether we should do so." Id. at ¶50.

A. Background Information.

KFCB is an independent UHF station which commenced broadcast operations in 1985. It is licensed to Concord, California which is part of what is commonly referred to as the Bay area. Concord is 32 miles from San Francisco, 40 miles from San Jose, and 19

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miles from Oakland. Arbitron includes KFCB within the San Francisco-Oakland-San Jose ADI.

KFCB competes directly with other television stations licensed to San Francisco, San Jose, and Oakland. KFCB places a Grade A signal over San Francisco, San Jose and Oakland. In turn, the Grade A signals of the commercial stations licensed to San Francisco, Oakland, and San Jose totally encompass Concord.¹

Without market redesignation as requested by KFCB, KFCB is put at a significant competitive disadvantage with other stations in the market. Generally, under the Commission's new cable rules, all cable systems within a station's ADI must carry stations within the ADI. See Report and Order Broadcast Signal Carriage Issues, FCC 93-1244 (released March 29, 1993). There are two provisos. First, a station must deliver an adequate headend signal to the cable system, and secondly, a station must agree to indemnify a cable system for any increased copyright liability. See Rule 76.51(c)(e) and 76.56(b). It is compliance with the later proviso that puts KFCB at a competitive disadvantage. There is no copyright liability for local stations -- that is for stations whose city of license is within 35 miles of the cable system. For a station licensed to a city which is listed

¹ These commercial stations are: KTVU, Oakland, California (Channel 2 Fox); KRON-TV, San Francisco (Channel 4 NBC); KPIX, San Francisco (Channel 5 CBS); KGO-TV, San Francisco, (Channel 7 ABC); KNTV, San Jose (Channel 11 ABC); KDTV, San Francisco (Channel 14, Independent); KOFY-TV, San Francisco (Channel 20, Independent); KTSF, San Francisco (Channel 26, Independent); KICU-TV, San Jose (Channel 36, Independent); KCNS, San Francisco (Channel 38, Independent); KBHK-TV, San Francisco (Channel 44, Independent); KSTS, San Jose (Channel 48, Independent); and KLXV-TV, San Jose (Channel 65, Independent).

in a hyphenated market, that station is local with respect to all cable systems within 35 miles of each of the other hyphenated cities as well.² In sum, although KFCB must compete in the same market as stations licensed to San Francisco, Oakland and San Jose, those stations are considered local stations to many more cable systems than KFCB. The result is that they have far less potential copyright liability. This economic disparity undermines the viability of KFCB.

B. Argument.

The San Francisco-Oakland-San Jose market is the fifth largest of the top 100 television markets listed in §76.51 of the Commission's Rules. The significance of the markets listed, including hyphenated markets, is its use in defining the scope of compulsory copyright license liability for cable operators and for territorial exclusivity rights under §73.658(m).³

The theory behind a hyphenated market is based on the premise that stations licensed to any of the named communities in a hyphenated market compete with the stations licensed to any of the other communities in the hyphenated market. A hyphenated television market has more than one major population center

² The Copyright Act obligates operators of cable television systems to pay royalty fees for the carriage of a distant, as opposed to a local, television station. Local signals are defined for copyright purposes in Section 111(f) of the Copyright Act as stations subject to mandatory carriage pursuant to the Commission's must carry rules in effect on April 15, 1976.

³ Rule 73.658(m) generally permits a television station to buy exclusive rights to non-network programming vis a vis other television stations in the same market and against stations no more than 35 miles distant.

supporting all the stations in the market. Market hyphenation helps equalize competition. Redesignation of the San Francisco-Oakland-San Jose-Concord market would permit market area cable systems to carry KFCB on an equal basis with other television stations licensed to the market without incurring distant signal copyright liability.

The Commission has considered some or all of the following factors as relevant in evaluating requests for hyphenation of a market:

- (1) The distance between the proposed community and the existing designated communities;
- (2) Whether cable carriage, if afforded to the subject station, would extend to areas beyond its Grade B signal coverage area;
- (3) The presence of a clear showing of a particularized need by the station requesting the change of market designation; and
- (4) An indication of benefit to the public from the proposed change.

See Major Television Markets (Fresno/Visalia, California), 57 RR2d 1122 (1985). An analysis of these factors assists the Commission in determining whether stations compete and whether hyphenation is warranted. The Commission also noted in its Report and Order, supra, that, "We will expect to receive evidence that demonstrates commonality between the proposed community to be added to a market designation and the market as a whole in such petitions." Id. at ¶50.

The facts demonstrate that Concord should be included in the existing San Francisco hyphenated market. It is evident that the communities, including Concord, constitute a single television

market. Concord is only 32 miles from San Francisco, 40 miles from San Jose, and 19 miles from Oakland. Concord receives Grade A service from all stations licensed to San Francisco, Oakland, and San Jose. KFCB provides Grade A service to San Jose, San Francisco, and Oakland. See Major Television Markets (Orlando-Daytona Beach-Melbourne-Cocoa, Florida), 57 RR2d 685, 690 (1985) ("We believe that television stations actually do or logically can rely on the area within the Grade B contours for economic support. Thus, we believe that the communities do, in fact, comprise a single television market for economic purposes.")

Arbitron includes Concord within the San Francisco-Oakland-San Jose "area of dominant influence." Also, KFCB derives over 90 percent of its revenue from cities other than Concord within the market. See Press Broadcasting Request to Include Clermont, Florida in the Orlando-Daytona Beach-Melbourne, Cocoa, Florida Television Market, DA93-579 (released May 19, 1993)(Arbitron's conclusion that Clermont is within the Orlando-Daytona Beach-Melbourne "area of dominant influence" also supports the conclusion that the stations compete and that there is economic interdependence). See also, Major Television Markets (Orlando, et al.), supra at ¶16.

It also appears that grant of the market re-hyphenation, as requested by KFCB, will not result in carriage beyond KFCB's Grade B contour. Indeed, under the Commission's new cable rules, it will result in no change in the number of cable systems on which KFCB may be carried. KFCB is entitled to carriage on cable systems within the San Francisco-Oakland-San Jose ADI regardless

of whether the market is redesignated. The difference in redesignation relates to the cost of such carriage. If the market is redesignated as requested by KFCB, it will be entitled to carriage on many more cable systems without having to indemnify many cable systems for increased copyright liability. As it is now, only cable systems within 35 miles of Concord may carry KFCB as a local station. If the market is redesignated, cable systems within 35 miles of Concord, San Francisco, San Jose, and Oakland may carry KFCB as a local station. This is the crux of KFCB's need for the requested market redesignation. It in essence allows KFCB to play on an even playing field and compete with the other stations in its market. The Commission adopted the hyphenated market provision into its original mandatory carriage rules "to help equalize competition" between stations in hyphenated markets and "to assure that stations will have access to cable subscribers in the market, and that cable subscribers will have access to all stations in the market." Cable Television Report and Order, 36 FCC Rcd. 143, 176 (1972). See also Major Television Markets (Fresno/Visalia, California), 57 RR2d 1122, 1125 (1985)(a particularized need for inclusion in the market evidenced by the fact that a station would be placed at a competitive disadvantage as against other stations in the same market).

The public interest is benefited since, by eliminating unfair competitive advantage to other market stations, the public is benefited by the continued viability of an additional independent voice in the market place. This is all achieved by

market re-designation at no expense to other San Francisco,
Oakland, San Jose stations.

Respectfully submitted,

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